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IN THE

Supreme Court of the United States

October Term, 1975

No. 75- 853

HOWARD PIPER, THOMAS F. PIPER and WILLIAM T. PIPER, JR.,

Petitioners,

v.

CHRIS-CRAFT INDUSTRIES, INC., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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September 5, 1975

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HOWARD PIPER, THOMAS F. PIPER and
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v.

CHRIS-CRAFT INDUSTRIES, INC., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Howard Piper, Thomas F. Piper and William T. Piper, Jr. ("the Piper individuals") respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on April 11, 1975.

Opinions Below

The opinion of the Court of Appeals (A-1)* reversing the United States District Court for the Southern District of New York after trial and finding liability is reported at 480 F.2d 341. Its subsequent opinion (B-1) reversing the District Court's determination after trial of the amount of

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* Each of the opinions below is reprinted in full in a separate volume of Joint Appendices A through E submitted herein. Page references beginning with "A", "B", "C", "D" or "E" are to that volume.

damages is reported at 516 F.2d 172. The opinion of the District Court after the first trial on liability is reported at 337 F. Supp. 1128 (A-125) and its opinion after the trial on remand to assess damages is reported at 384 F. Supp. 507 (B-43).

Earlier opinions of the Court of Appeals (C-1) and the District Court (C-32) relating to an application for a preliminary injunction are reported at 426 F.2d 569 and 303 F. Supp. 191, respectively. In addition, there were related cases, to which the Piper individuals were not parties, reported at 331 F. Supp. 1154 (D-1) and 337 F. Supp. 1147 (D-22).

Jurisdiction

The judgment of the Court of Appeals was entered on April 11, 1975 (E-1). A timely petition by the Piper individuals for rehearing and rehearing *en banc* was denied on June 9, 1975 (E-5, E-7). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether under Section 14(e) of the Securities Exchange Act of 1934 a tender offeror is entitled to $36 million in damages from management of the target corporation for alleged misrepresentations in letters to shareholders recommending against accepting the tender offer in the absence of proof of a causal connection, which connection was replaced by the irrebuttable presumptions (a) that shareholders relied on the misrepresentations and hence did not tender; (b) that as a result the offeror acquired fewer shares on its tender offer, although more than it had offered to purchase; and (c) that this caused injury to the offeror seven months later when another corporation acquired majority control of the target corporation?

2. Whether management of the target corporation may be held jointly and severally liable with another corporation which, seven months after management's alleged violations of Section 14(e), achieved control of the target corporation through its own unrelated and independent violations of the securities laws of which management had no prior knowledge, and in which they did not participate?

3. Whether under Section 28(a) of the Securities Exchange Act of 1934 Respondent is entitled to a $36 million judgment without proof of the actual damages it suffered on account of the acts complained of thereby placing the entire burden of intervening market losses on the Petitioners without affording them an opportunity to adduce proof on the matter?

Statutes Involved

Sections 14(e) and 28(a) of the Securities Exchange Act of 1934 ("1934 Act"), 15 U.S.C. §§ 78n(e) and 78bb(a), respectively, are set forth in the Addendum to this petition.

Statement of the Case

Petitioners seek review of the decisions of the Court of Appeals twice reversing the District Court after trial and increasing the damages awarded to Respondent Chris-Craft Industries, Inc. ("Chris-Craft") from $1,673,988 plus $599,010.89 pre-judgment interest to $25,793,365 plus over $10,000,000 pre-judgment interest.

The Piper individuals were officers and directors of Piper Aircraft Corporation in January 1969 when Chris-Craft made a tender offer for up to 300,000 shares of Piper Aircraft at $65 per share (A-10). With the advice of outside consultants, the Board of Directors of Piper Aircraft decided to oppose Chris-Craft's tender offer as inadequate and not in the best interests of all shareholders (A-11).

The Board also attempted to find a better alternative than Chris-Craft. These opinions and actions of the Board were communicated to Piper Aircraft's shareholders (A-11). Use of the word "inadequate" and the description of the alternative were subsequently found by the Court of Appeals to be misrepresentations (A-38, A-39). Despite the alleged misrepresentations, at the close of the tender offer Chris-Craft still acquired more shares than it had offered to purchase (A-113).

In May 1969, three months later, Bangor Punta Corporation began purchasing Piper Aircraft shares, paying over $70 and as much as $80 per share (A-16, B-26). By September 1969 it had acquired over 800,000 Piper Aircraft shares, enough to give it control (A-18). Of those shares, about 200,000 were held to have been acquired by Bangor Punta in violation of the securities laws, and held to have denied Chris-Craft a fair opportunity to compete for control (A-60, A-66). The Piper individuals did not participate in or have any knowledge of those violations. Nevertheless, the Court of Appeals held the Piper individuals jointly and severally liable with Bangor Punta for $36 million in damages.

a. Factual Background

This action was filed by Chris-Craft on May 22, 1969 against Piper Aircraft and the Piper individuals, Bangor Punta and certain of its officers and The First Boston Corporation and two of its officers. It stems from purchases of shares of common stock of Piper Aircraft that Chris-Craft began making in December 1968 (A-9). On January 23, 1969 Chris-Craft, which would have needed more than 500,000 additional Piper Aircraft shares to obtain control, announced a cash tender offer for up to only 300,000 shares at $65 per share (A-10).*

* At the time the stock was selling for $52.50 per share on the New York Stock Exchange (A-10).

The tender offer remained open only 11 days, until February 3, 1969 (A-10). Chris-Craft had made no arrangements for the financing it would require were it to purchase more than 300,000 shares (B-61).

Upon receiving notice of Chris-Craft's tender offer, the management of Piper Aircraft immediately sought advice concerning Chris-Craft from its investment advisor, First Boston, its counsel and its auditors (A-10). Thereafter, in light of the information obtained, the Board of Directors of Piper Aircraft—consisting of the three Piper individuals and five other members—considered the tender offer and adopted a resolution opposing it (A-11). The substance of the resolution—that the offer was inadequate and not in the best interests of Piper Aircraft's shareholders—was communicated to Piper Aircraft shareholders by letters dated January 27 and 28, 1969. The letters were signed by W. T. Piper, Jr., president of Piper Aircraft at the time and one of the Petitioners herein (A-11).

Piper Aircraft at the same time sought out other companies in an effort to find a better alternative than Chris-Craft. Among the companies contacted was Grumman Aircraft Engineering Corporation. After negotiations Piper Aircraft agreed to sell Grumman 300,000 authorized but unissued shares of stock of Piper Aircraft at $65 per share—the Chris-Craft tender offer price (A-11). This agreement was announced to shareholders on January 29, while Chris-Craft's tender offer was still open (A-12). The result of the announcement was to make Chris-Craft's tender offer more attractive since the market price of Piper Aircraft shares declined from $64¼ per share on January 28 to $59⅝ on February 3, when Chris-Craft's tender offer closed (A-114, n. 3).*

* Since more shares would have been outstanding, of course, the $65 price to Grumman actually reflected a higher value per share than the $65 offered by Chris-Craft on its tender offer. Had the shares been issued, the previously outstanding shares would have been worth proportionately less.

One of the numerous terms in the agreement, which was not specifically referred to in the announcement, was that the agreement could be terminated if merger negotiations proved unfruitful and Piper Aircraft would either find another buyer for the shares or return the purchase price to Grumman plus nominal interest (A-11). This provision was referred to by the courts below as an option to Grumman to "put" the shares back to Piper Aircraft (A-11, A-129, n. 2).*

At the close of Chris-Craft's tender offer it received 304,606 shares of Piper Aircraft stock—more than the 300,000 shares it sought. It purchased them all, giving it a total of 547,106 shares, or about 33% of the shares outstanding (A-12).

The January communications described above constituted the sole actions of the Piper individuals for which the Court of Appeals held them jointly and severally liable to pay damages to Chris-Craft of more than $36,000,000!

The Piper individuals were held liable because Bangor Punta, which began purchasing Piper Aircraft shares in May 1969, had by September 1969 acquired more than 50% of the outstanding shares (A-18). In so doing, it frustrated Chris-Craft's decision—reached in mid-February 1969 after the events just described (B-61)—to acquire over 50% of the shares itself.

About 120,000 shares of the stock acquired by Bangor Punta in May 1969 were found to have been acquired in violation of Rule 10b-6 under the 1934 Act, 17 C.F.R. § 240.10b-6 (A-64), and another 111,000 shares (a combined total of about 14% of the outstanding shares) were found to have been acquired by Bangor Punta in July 1969 in violation of Section 14(e) of the 1934 Act (A-48). The

* For reasons not material here, the shares were never issued and the agreement was terminated by mutual consent on March 19, 1969 (A-12).

Court of Appeals held that, since Chris-Craft acquired about 42% while Bangor Punta acquired about 51% of the stock, the 14% found to have been illegally acquired by Bangor Punta provided sufficient basis for liability (A-60, A-67).

The Piper individuals did not have knowledge of, or participate in, either of the Bangor Punta violations. Nevertheless, considering Bangor Punta's "narrow margin of victory" (A-63) they were held jointly and severally subject to a crippling judgment amounting to over $36 million because their alleged violations of Section 14(e) "contributed to the success" of Bangor Punta's "takeover attempt" (A-69).

The violations of Section 14(e) found by the Court of Appeals were calling the tender offer "inadequate" and not describing the "put" in the January communications. The Court of Appeals, reversing the trial court, held these were material misrepresentations (A-38-39). Inferring that the shareholders relied on the misrepresentations, the Court of Appeals then held this presumably denied Chris-Craft "the opportunity to purchase additional shares" on its tender offer and, since Bangor Punta eventually acquired control, the Court of Appeals assumed that Chris-Craft was denied "a fair opportunity to win the contest for control" (A-62-63). Chris-Craft, however, always maintained that in making its purchases pursuant to its tender offer it was not committing itself to obtaining control of Piper Aircraft (B-61).*

b. Proceedings Below

The action was tried in March 1971 concurrently with two related cases brought by Bangor Punta against Chris-Craft and by the SEC against Bangor Punta.** After

* For example, it stated in its Schedule 13D filed concurrently with its tender offer pursuant to the Williams Act, 15 U.S.C. § 78n(d-f), that it did not have any specific plan or proposal to acquire control of Piper Aircraft and that the purchases were made only with a "view" towards control (B-61).

** The Piper individuals were not parties to either of the other two cases.

trial the District Court dismissed Chris-Craft's complaint against all defendants in December 1971 (A-125). The Court of Appeals reversed in April 1973 (A-1) and remanded the case with explicit directions to hold all defendants, except Piper Aircraft, jointly and severally liable and to award damages and injunctive relief to Chris-Craft (A-69).

The Court of Appeals reversal as to the Piper individuals was based upon its own determination that calling the offer "inadequate" and not describing the resale provision in the January communications violated Section 14(e).

In the District Court Chris-Craft claimed that the letters of January 27 and 28, which conveyed the opinion of the Piper Aircraft Board of Directors that the Chris-Craft tender offer was "inadequate and not in the best interests" of Piper Aircraft shareholders, were materially misleading. The District Court rejected the claim and concluded (i) that the word "inadequate" referred to the entire limited tender offer and not just to the price and (ii) even assuming "inadequate" referred to price, the statement "would be more fatuous than misleading" because any "shareholder with a telephone or newspaper at hand could compare the current market for Piper [Aircraft] shares with Chris-Craft's offer" (A-135). The Court of Appeals disagreed with the trial court and held that the word "inadequate" referred to price and not the entire offer. It then found use of the word "inadequate" materially misleading because the tender offer price of $65 per share was considerably higher than the current market price of $52 per share and First Boston had told Piper Aircraft that the price itself was fair although it agreed that the offer was inadequate (A-37-38).

The Court of Appeals also held the Piper individuals liable for not disclosing the Grumman "put" in the announcement of January 29. Although it concurred with the District Court's finding that the agreement with Grumman

was not a sham and that the resale provision was a rational and logical part of the agreement, it disagreed with the District Court's finding that the omission did not injure Chris-Craft (A-39).

The trial court had rejected as "unfounded" Chris-Craft's contention that the January communications caused it injury since Chris-Craft was not seeking more than 300,000 shares on its tender offer and "did not have sufficient funds to purchase any significant amount in excess of 300,000" (A-113). A majority of the Court of Appeals held, however, that it was a "reasonable presumption that [Chris-Craft] was unlawfully denied the opportunity to purchase additional shares" (A-62). The dissenting judge agreed with the trial judge that Chris-Craft failed to show any injury because it "got more shares than it agreed to buy" (A-113).

The defendants petitioned this Court for writs of certiorari, which were denied in October 1973.* Thereafter, in March 1974 the District Court conducted the trial on remand pursuant to the Court of Appeals mandate to award damages based upon "the reduction in the appraisal value of [Chris-Craft's] Piper holdings attributable to [Bangor Punta's] taking a majority position and reducing [Chris-Craft] to a minority position, and thus being able to compel a merger at any time" (A-69).

Since the Court of Appeals agreed with the District Court that Chris-Craft had failed to prove that it would have obtained a majority of the shares of Piper Aircraft absent the violations found, what Chris-Craft lost, it held, was the opportunity to compete for control (A-56, A-60, A-66). The trial court, on remand, attempted to place a value on that lost opportunity. It found that actual majority control was worth between 5% and 10% of the fair market value of Piper Aircraft stock and that the "*oppor-*

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* 414 U.S. 910. Nos. 73-152, 73-153 and 73-154.

tunity (speculative at best) of gaining a majority" of the shares "is generously valued at 5% above fair market value of the stock" (B-70, emphasis the Court's). Accordingly, the trial judge awarded Chris-Craft damages of $1,673,988 calculated as of the date Bangor Punta acquired control (B-70). The trial court denied Chris-Craft's claim for consequential damages, but in its discretion awarded Chris-Craft pre-judgment interest (B-79) for a total judgment of over $2.2 million.*

Chris-Craft appealed from the judgment, claiming it was insufficient, while defendants cross-appealed claiming both that the judgment was excessive and that the 1973 decision of the Court of Appeals was erroneous.

The Court of Appeals in April 1975 reversed the damage award and directed entry of a modified judgment of $25,793,365 plus pre-judgment interest, which at present would amount to over $10 million, for a total judgment of about $36 million. It awarded these astronomical damages by abandoning its mandate that the trial court evaluate the loss of the opportunity to compete for control and declared instead, for the first time, that Chris-Craft be awarded damages measured by the difference between what Chris-Craft paid for all the Piper Aircraft shares it owned on September 5, 1969 and the hypothetical price that Chris-Craft could have obtained had it sold the shares in January 1970 (B-28-30).

Reasons for Granting the Writ

The Court of Appeals observed that this case presents "important questions, some of first impression, involving the antifraud provisions of the federal securities laws in their application to a contest for acquisition of a control-

* In addition, pursuant to the remand, the District Court entered an injunction against Bangor Punta (B-71 *et seq.*), the provisions of which this Petition does not contest.

ling stock interest in a target corporation" (A-6). It has set a precedent for determining "the scope of liability and relief under Section 14(e)" (A-6) which is contrary to decisions in other circuits and to the decisions of this Court.

I. The Court of Appeals determinations on causation, liability and relief conflict with decisions of other Courts of Appeals and have since been rejected by this Court's decisions in *Blue Chip Stamps* v. *Manor Drug Stores* and *Rondeau* v. *Mosinee Paper Corp.*

The effect of the Court of Appeals decision is to dispense entirely with the traditional requirement of proof of a causal connection between the Piper individuals' alleged misrepresentations in January and Chris-Craft's alleged injury when it lost the opportunity to gain control in September. The trial court had held that Chris-Craft's claims concerning the January communications were unfounded (A-138) and that it failed to establish any causal connection between the alleged violations and its claimed injury (A-147).

The Court of Appeals reversed, observing that one of "the fundamental issues upon which we disagree with the district court is that of causation" (A-55). It held that although the January communications were directed to the Piper Aircraft shareholders and not to Chris-Craft, nevertheless, since they contained misrepresentations, the shareholders presumably relied upon them and did not tender to Chris-Craft (A-62). Therefore, the Court of Appeals held, "it is a reasonable presumption that [Chris-Craft] was unlawfully denied the opportunity to purchase additional shares" (A-62). Based upon that presumption, and "considering the narrow margin of victory" by which Bangor Punta acquired control in September (A-63), the Court of Appeals then speculated that calling the offer "inadequate" in January denied Chris-Craft "a fair opportunity to win the contest for control" in September and presumed that as a result, Chris-Craft was injured (A-63).

Thus, by a series of presumptions the Court of Appeals majority dispensed with the need for Chris-Craft to prove that it was injured by the alleged violations in January and thereby permitted a completely conjectural and speculative recovery—it was on this very issue that one judge dissented (A-116). The Court of Appeals' position is in direct conflict with this Court and the Courts of Appeal for the First, Third, Fourth, Fifth, Seventh and Tenth Circuits.

The result reached in the Second Circuit exemplifies the propriety of the concern expressed by this Court in *Blue Chip Stamps* v. *Manor Drug Stores*, —— U.S. ——, 95 S.Ct. 1917 (1975), decided on the same day rehearing was denied by the Court of Appeals. That concern is that when the courts grant standing to sue to a plaintiff who claims an "intangible economic injury such as loss of a noncontractual opportunity" to purchase shares, plaintiff will seek —and here has been granted—a large "conjectural and speculative recovery in which the number of shares involved will depend on the plaintiff's subjective hypothesis." (95 S.Ct. at 1925). Here, neither Chris-Craft nor the Court of Appeals made any effort to determine the number of shares not tendered to Chris-Craft. Its ultimate defeat by Bangor Punta seven months later was the sole basis for awarding Chris-Craft over $36 million in damages assessed against three individuals for calling a tender offer "inadequate."*

Furthermore, by presuming that Piper Aircraft shareholders did not tender to Chris-Craft because of the alleged misrepresentations in the January communications, the Court of Appeals rejected the obvious alternatives noted by this Court in *Blue Chip*—shareholders did not tender for reasons unrelated to the misrepresentations. "Ownership of stock or receipt of a prospectus says little about

* That the offer was inadequate was confirmed by the fact that later offers to shareholders were for as much as $80 per share (A-16).

whether a plaintiff's investment decision was affected by a violation of Rule 10b-5 or whether a decision was even made" (95 S.Ct. at 1930, n. 10). Nevertheless, the Court of Appeals made the presumption on appeal and in so doing denied the Piper individuals even the opportunity to offer any proof that shareholders did not tender in anticipation of receiving more for their shares later.

This is in direct conflict with the Third and Fourth Circuits which, although inferring reliance from a material non-disclosure nevertheless permit the defendant to offer proof that the non-disclosure did not cause the plaintiff's loss. *Rochez Bros., Inc.* v. *Rhoades*, 491 F.2d 402, 410 (3 Cir. 1974); *Carras* v. *Burns*, 516 F.2d 251, 257 (4 Cir. 1975).

The result reached by the court below also is in direct conflict with *Rondeau* v. *Mosinee Paper Corp.*, —— U.S. ——, 95 S.Ct. 2069 (1975), decided after rehearing was denied below. In *Rondeau* this Court made it clear that the Williams Act, which added Section 14(e) to the 1934 Act, still requires plaintiff to establish the traditional prerequisites of relief (95 S.Ct. at 2078). One of those traditional prerequisites is that a defendant only "is liable to respond in such damages as naturally and proximately result from the fraud." *Estate Counseling Service, Inc.* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 303 F.2d 527, 533 (10 Cir. 1962). See also *Clegg* v. *Conk*, 507 F.2d 1351, 1361 (10 Cir. 1974).

Furthermore, in *Rondeau* this Court reaffirmed the principle of *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 389 (1970), that "damages should be recoverable only to the extent that they can be shown" and re-emphasized that the relief to which plaintiff is entitled "is to be determined according to traditional principles" (95 S.Ct. at 2079). Other circuits have uniformly required the traditional proof of causation before awarding damages.

The Fifth Circuit holds that plaintiff must prove some causal connection between the alleged violation and the

plaintiff's injury. *Sargent* v. *Genesco, Inc.*, 492 F.2d 750, 761 (5 Cir. 1974).* The question is "did the injury to the plaintiff flow directly and proximately from the actions of this particular defendant." *Hill York Corporation* v. *American International Franchises, Inc.*, 448 F.2d 680, 693 (5 Cir. 1971).

The First Circuit has also expressed its "agreement that proof of proximate cause was an indispensable part of plaintiff's burden" *Landry* v. *Hemphill, Noyes & Co.*, 473 F.2d 365, 370 (1 Cir. 1973), cert. denied 414 U.S. 1002.

The Seventh Circuit similarly holds that before monetary damages may be recovered there must be proof (not conjecture) that the violation caused the pecuniary loss. *Dasho* v. *Susquehanna Corp.*, 461 F.2d 11, 30 (7 Cir. 1972), cert. denied 408 U.S. 925; *Swanson* v. *American Consumers Industries, Inc.*, 475 F.2d 516, 519 (7 Cir. 1973). The violation must be the direct cause of the injury. Thus, no liability attaches to a false proxy statement when a fair and complete proxy statement is issued subsequently; the later "proxy statement broke the chain of causation between the earlier proxy statement and any damage allegedly caused by it." *Schy* v. *Susquehanna Corporation*, 419 F.2d 1112, 1117 (7 Cir. 1970), cert. denied 400 U.S. 826.

The Court of Appeals in this case, however, dispensed with any proof that calling the tender offer "inadequate" and not describing the "put" caused Chris-Craft injury. It speculated that calling the offer "inadequate" in January contributed to Chris-Craft's defeat in September and directed that Chris-Craft be awarded a judgment in excess of $36 million.

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* Indeed, the Fifth Circuit holds that Section 14(e) grants standing only to those security holders to whom the tender offer is addressed and not to some other party. "No violation of 14(e) could be shown where the class sought to be protected has not been harmed" (492 F.2d at 769). Here, the Piper Aircraft shareholders who did not tender to Chris-Craft were not harmed because they received more for their shares later.

By allowing Chris-Craft to sue for damages and then dispensing with the traditional requirement of proof of causation, the Second Circuit exposes individual members of management who in good faith oppose a tender offer to "a liability in an indeterminate amount for an indeterminate time to an indeterminate class." *Ultramares Corp.* v. *Touche*, 255 N.Y. 170, 179, 174 N.E. 441, 444 (1931). The propriety of extending such liability is an issue properly for this Court. Moreover, by affording relief without proof of causation, the Second Circuit has placed itself in sharp conflict with other Courts of Appeals. Therefore, Petitioners request that this Court grant a writ of certiorari to resolve this conflict of decisions and to correct the erroneous holding of the Court of Appeals.

II. The decision below conflicts with traditional principles applied in other circuits for the imposition of joint and several liability.

In directing joint and several liability the Second Circuit not only abandoned the requirement of proof of causation, but in so doing it of necessity disregarded the principle of superseding cause. Other circuit courts have held that a wrongdoer is not liable when the damage for which a plaintiff is to be compensated results from an independent, intervening agency, which was not reasonably foreseeable. Here the Second Circuit has held the Piper individuals jointly and severally liable to Chris-Craft because of alleged misleading statements in January (A-62-63). The judgment of $36 million, however, is not intended to compensate Chris-Craft for what happened in January but, rather for the "reduction in the value of [Chris-Craft's] Piper holdings upon [Bangor Punta] unfairly obtaining control" (B-10) in September.

Although the Piper individuals did not participate in or have knowledge of the alleged violations by Bangor Punta in May and July 1969, that fact is ignored. The Court of Appeals majority simply declared that the violations by

the Piper individuals "contributed to the success of [Bangor Punta's] takeover attempt" and, therefore, they are jointly and severally liable (A-69).

The alleged violations by the Piper individuals in January 1969, however, were presumed merely to have denied Chris-Craft the opportunity to purchase additional shares on its tender offer. Chris-Craft could have and did purchase additional shares thereafter (A-137). Nevertheless, Chris-Craft is to be compensated for the reduction in value of all shares it purchased. Assuming a reduction occurred at all, it did not come about until September 1969 when Bangor Punta acquired over 50% of the Piper Aircraft shares (A-60). Indeed, the Court of Appeals observed that had Chris-Craft won its control battle with Bangor Punta it would not have sustained such damages (A-61). Clearly, the Piper individuals were not responsible for that injury.

Other circuit courts have recognized the common law doctrine of superseding or intervening cause in tort cases.* That doctrine relieves the first tortfeasor of liability because his conduct, although wrongful, was not the cause of plaintiff's injury.**

Not only did the Second Circuit ignore the effect upon Chris-Craft of Bangor Punta's subsequent and superseding violations, but it also failed to consider the principle that independent joint tortfeasors cannot be held jointly and severally liable when their acts cause distinct and separable injuries. "Damages for harm are to be apportioned among two or more causes where (a) there are distinct harms, or (b) there is a reasonable basis for determining the contribution of each cause to a single harm."* Restatement, Second, Torts § 433A. If the Piper individuals are to be held liable at all, the presumed consequence of their actions in January is distinct and separable from the presumed effect of Bangor Punta's acquisition of control seven months later.

By refusing to consider either the principle of superseding cause or the apportionment of damages, the Court of Appeals was able to hold that Chris-Craft is to be compensated by all defendants for the decline in value of its Piper Aircraft holdings occurring when Bangor Punta acquired control. The only basis for imposing joint and several liability on the Piper individuals is that they "contributed" to Bangor Punta's success (A-69). Hence their liability can only stand if they are aiders and abettors. No such determination was made with respect to them. The result reached thus conflicts with other circuit court decisions.

When joint and several liability for aiding and abetting a violation of the securities laws is imposed, there must be proof of the following three elements: "(1) that an independent wrong exists; (2) that the aider or abettor knew

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* That a violation of the securities laws is tortious in nature is well settled, see, *e.g.*, *Myzel* v. *Fields*, 386 F.2d 718, 744, n. 22 (8 Cir. 1967), cert. denied 390 U.S. 951 (1968); *Crist* v. *United Underwriters, Ltd.*, 343 F.2d 902, 904 (10 Cir. 1965). In determining liability in securities act cases, traditional common law principles apply. *Rondeau* v. *Mosinee Paper Corp.*, —— U.S. ——, 95 S.Ct. 2069, 2078 (1975).

** *E.g. Schreffler* v. *Birdsboro Corp.*, 490 F.2d 1148, 1154 (3 Cir. 1974); *Black* v. *United States*, 441 F.2d 741, 745-6 (5 Cir. 1971), cert. denied 404 U.S. 913; *Michael* v. *United States*, 338 F.2d 219, 220 (6 Cir. 1964); *Leistra* v. *Bucyrus-Erie Company*, 443 F.2d 157, 162-3 (8 Cir. 1971); *United States ex rel. Standard Oil Co. of California* v. *Natt McDougall Company*, 381 F.2d 686, 689 (9 Cir. 1967); *Texas Metal Fabricating Company* v. *Northern Gas Products Corp.*, 404 F.2d 921, 925 (10 Cir. 1968).

* This principle has been followed by other Courts of Appeals which have held several tortfeasors jointly and severally liable. *Borel* v. *Fibreboard Paper Products Corporation*, 493 F.2d 1076, 1094-5 (5 Cir. 1973), cert. denied 419 U.S. 869 (1974); *Michie* v. *Great Lakes Steel Division, National Steel Corp.*, 495 F.2d 213, 217 (6 Cir. 1974), cert. denied 419 U.S. 997. The Second Circuit itself has upheld the apportionment of damages for separable injuries in a later decision. *Modave* v. *Long Island Jewish Medical Center*, 501 F.2d 1065, 1073 (2 Cir. 1974). Here, however, having ignored the matter on appeal, the Second Circuit did not even give the Piper individuals an opportunity to adduce proof on the issue of apportionment.

of that wrong's existence; and (3) that substantial assistance be given in effecting that wrong." *Landy* v. *Federal Deposit Insurance Corporation,* 486 F.2d 139, 162-3 (3 Cir. 1973).

The Second Circuit found an independent wrong by Bangor Punta, but it nowhere found, nor did Chris-Craft ever claim, that the Piper individuals knew, or should have known, of that wrong's existence or that they gave substantial (or any) assistance to Bangor Punta in effecting it. The imposition of joint and several liability in the absence of such facts places the Second Circuit in direct conflict with the Third, Sixth, Seventh, Ninth and Tenth Circuits.* See e.g., *Landy* v. *Federal Deposit Insurance Corporation, supra,* 486 F.2d at 163-4; *SEC* v. *Coffey,* 493 F.2d 1304, 1316-17 (6 Cir. 1974); *Brennan* v. *Midwestern United Life Insurance Co.,* 417 F.2d 147, 154 (7 Cir. 1969), cert. denied 397 U.S. 989; *Northway Inc.* v. *TSC Industries, Inc.,* 512 F.2d 324, 339-40 (7 Cir. 1975); *Wessel* v. *Buhler,* 437 F.2d 279, 283 (9 Cir. 1971); *Strong* v. *France,* 474 F.2d 747, 752 (9 Cir. 1973); *Kerbs* v. *Fall River Industries, Inc.,* 502 F.2d 731, 740 (10 Cir. 1974).

By applying improper standards for the imposition of joint and several liability against three individual members of management, the Second Circuit has drastically penalized management in contested tender offers. "[I]n contests for control the management has a role to play as such and not merely insofar as the managers are stockholders." *Studebaker Corp.* v. *Gittlin,* 360 F.2d 692, 695 (2 Cir. 1966). The propriety of curtailing that role and extending joint and several liability to parties who have not participated in, or have any knowledge of, wrongful conduct by another is sufficient reason to warrant the issuance of a writ of certiorari to review and correct the decision of the Court of Appeals.

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* The decision even conflicts with the Second Circuit's own decision in *Lanza* v. *Drexel & Co.,* 479 F.2d 1277, 1302-3 (2 Cir. 1973), decided after the panel's reversal on the liability issue.

III. The fifteenfold increase in the damage award by the Court of Appeals conflicts with § 28(a) of the 1934 Act, decisions in the Eighth, Ninth and Tenth Circuits and constitutes a gross miscarriage of justice.

Although the Piper individuals' liability was based on calling the tender offer "inadequate" and not describing the "put" in January 1969, the Court of Appeals nevertheless awarded $36 million in damages to Chris-Craft calculated upon a hypothetical sale in January 1970, a year later. The trial court found, and the Court of Appeals agreed, that September 5, 1969 was the proper date for valuing Chris-Craft's injury (B-13, n. 10). That was when Bangor Punta acquired over 50% of the Piper Aircraft shares. Until Bangor Punta acquired those shares Chris-Craft still had the opportunity to purchase control for itself. If Chris-Craft was injured at all, it was then.

Under these circumstances the Court of Appeals in its liability decision set forth a precise formula for measuring Chris-Craft's damages (A-69):

> "The measure of damages should be the reduction in the appraisal value of [Chris-Craft's] Piper holdings attributable to [Bangor Punta's] taking a majority position and reducing [Chris-Craft] to a minority position, and thus being able to compel a merger at any time."

Heeding that mandate, the District Court on remand attempted to value the reduction as of September 5, 1969. That value, the District Court held, was 5% of the fair market value of Piper Aircraft shares, or $2.40 per share (B-70). Multiplied by the total number of shares Chris-Craft owned at that time the damages were $1,673,988; with pre-judgment interest the total judgment was $2,272,998.89 (B-11-12).

The Court of Appeals reversed and directed entry of judgment for $25,793,365 plus pre-judgment interest (B-3) for a total of about $36 million. The modified damage award was not predicated on the reduction in value attributable to Bangor Punta gaining control as the mandate required, but rather on the difference between Chris-Craft's average cost per share and $27, the hypothetical price per share Chris-Craft might have received had it sold its shares, not in September 1969 but in January 1970 (B-29-30).

By discarding the original formula for calculating damages and using Chris-Craft's cost, the Court of Appeals increased Chris-Craft's award by about $16 per share. By using a January 1970 date rather than September 1969 the Court further increased Chris-Craft's award by about $15 per share. The defendants have not had the opportunity to offer proof on either of these points, which only became relevant issues after the Court of Appeals changed its mandate.

By using costs and a hypothetical sale price of $27 per share, the Court of Appeals damage award includes the full premium over the market price that Chris-Craft paid before any violations occurred.* It also includes all intervening market losses between December 1968 when Chris-Craft purchased its first shares and January 1970. These losses are completely unrelated to the violations found. The Court of Appeals acknowledged this by stating that what it was doing was "shifting the entire burden of [Chris-Craft's] loss to defendants" (B-27). To compound the injustice Chris-Craft, which claims to have spent $44 million to acquire its shares (A-18), will (a) receive $36 million as alleged compensatory damages, (b)

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* Chris-Craft acquired over 200,000 shares of stock before announcing its tender offer. All of the shares were purchased for over $50 per share, with 101,000 of them purchased for $65 per share the day before Chris-Craft made its tender offer (A-9-10).

retain its shares and (c) be the beneficiary of a five-year injunction against Bangor Punta voting over 200,000 of its shares.

Thus, far from being compensatory the damages are punitive and in direct contravention of § 28(a) of the 1934 Act. That statute requires that only "actual damages on account of the act complained of" be awarded. The decision also conflicts with the holdings of other circuits that only actual and not punitive damages may be awarded for violations of the securities laws, e.g. *Richardson* v. *MacArthur,* 451 F.2d 35, 43 (10 Cir. 1971); *Myzel* v. *Fields,* 386 F.2d 718, 748 (8 Cir. 1967), cert. denied 390 U.S. 951 (1968); and with other panels of the Second Circuit itself, *Green* v. *Wolf Corporation,* 406 F.2d 291, 303 (2 Cir. 1968), cert. denied sub. nom. *Trosta, Singer and Co.* v. *Green,* 395 U.S. 977; *Globus* v. *Law Research Service, Inc.,* 418 F.2d 1276, 1286 (2 Cir. 1969), cert. denied 397 U.S. 913 (1970).

Moreover, the decision also conflicts with decisions in the Eighth, Ninth and Tenth Circuits which prohibit plaintiffs from recovering damages resulting from independent market forces rather than the alleged securities act violation. Thus, when a purchaser of stock is defrauded in connection with his purchase, he is entitled to collect damages measured as of the date of discovery of the fraud. Any subsequent decrease in market price cannot be used to increase his damage award and, conversely, any subsequent increase in market price cannot be used to reduce his damage award. "This is the only method in which a consistent measure of damages can be obtained." *Harris* v. *American Investment Company,* Cur. Vol. CCH Fed. Sec. L. Rep., ¶ 95,208, at p. 98,054 (8 Cir. 1975).

Similarly, in *Foster* v. *Financial Technology, Inc.,* [1974-1975 Transfer Binder] CCH Fed. Sec. L. Rep., ¶ 95,103, at p. 97,913 (9 Cir. 1975), the Ninth Circuit held that "damages are limited by what [plaintiffs] would have realized

if they had acted upon their claim when they first learned of the fraud or had reason to know of it." See also, *Esplin* v. *Hirschi,* 402 F.2d 94, 104-5 (10 Cir. 1968), cert. denied 394 U.S. 928 (1969); *Richardson* v. *MacArthur,* 451 F.2d 35, 44 (10 Cir. 1971).

The result of the decision of the Second Circuit, however, is that a violaton of Section 14(e) by management during a tender offer makes management an insurer of the raider's otherwise normal market risks. It extends their liability past the dates when the raider (a) discovers the violation; (b) brings suit therefor; and (c) loses the battle for control. If the raider fails, management must reimburse it for the full premium paid over the market price plus all intervening market declines. These amounts cannot be determined, or even mitigated or avoided, until the control contest ends, the victor emerges and the loser either sells his shares or the court finds a hypothetical sale date some time later. In short, the Second Circuit has given Chris-Craft both the benefit of a series of irrebuttable presumptions which eliminated proof of "actual damages on account of the act complained of" and a guarantee against market losses.

Finally, by determining factual issues for the first time on appeal, the Second Circuit has effectively denied the Piper individuals their day in court. Had the factual issues on damages decided at the appellate level been the subject of proof at the trial level, the Piper individuals could have shown: (1) the value to Chris-Craft in January 1969 of an opportunity to purchase additional shares on its tender offer, and (2) when Chris-Craft could have disposed of its shares after January 1969 and the amount it could have received on such disposition. Those issues were never litigated in the trial court and were never briefed in the Court of Appeals. They were decided by the Court of Appeals without a remand and without the taking of any evidence.

For these reasons alone we respectfully urge this Court grant a writ of certiorari to review and correct the decision of the Court of Appeals.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 5, 1975

ADDENDUM

Section 14(e), Securities Exchange Act of 1934, 15 U.S.C. § 78n(e)

"(e) It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation."

By P.L. 91-567 adopted December 22, 1970, after the events complained of in this action, Congress added the following sentence:

"The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative."

Section 28(a), Securities Exchange Act of 1934, 15 U.S.C. § 78bb(a)

"(a) The rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity; but no person permitted to maintain a suit for damages under the provisions of this chapter shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of. Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder."

Certificate of Service

I hereby certify that three copies of the foregoing Petition for a Writ of Certiorari were served by hand this 5th day of September on Arthur L. Liman, Esq., 345 Park Avenue, New York, New York 10022, counsel for Respondent. I further certify that all parties required to be served have been served.

Dated: September 5, 1975

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